SUPREME COURT OF FLORIDA

CASE NO. SC00-833

PIRELLI ARMSTRONG TIRE
CORPORATION, etc.,

Petitioner,

v.

META E. JENSEN, etc., et al.,

Respondent.
/

PETITIONER'S INITIAL BRIEF ON THE MERITS

On Certified Question from the
District Court of Appeal,
Second District

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INTRODUCTION

Pirelli Armstrong Tire Corporation ("Pirelli") seeks review of a Second District Court of Appeal decision affirming a final judgment for Plaintiffs awarding attorneys' fees in the amount of $960,876.91, pursuant to an offer of judgment.

In this Brief, the parties will be referred to by proper name or as they appeared in the trial court.

The Record in this case was originally prepared for the appeal from the underlying final judgment. For the attorneys' fee appeal, the clerk continued to consecutively number the Record, but began new numbering for the Transcripts of some of the attorneys' fees hearing. Accordingly, references to the Record will be as follows:

"R." - Record (pp. 1-4170)

"T." - Trial transcript (pp. 1-2046) (contained in volumes 8-22)

"S.T." - Transcript of attorneys' fees hearings (pp. 1-524) (contained in volumes 35-37)

The following documents are including in an Appendix to this brief for the Court's convenience:

A.1. Trial court order awarding attorneys' fees is included as an appendix to this brief. A.2 Second District Court of Appeal decision.

STATEMENT OF THE CASE

Meta Jensen as Personal Representative of the Estate of Alwin Jensen brought a products liability claim against Pirelli. (R. 1-15) Three months later, Plaintiffs served a demand for judgment pursuant to section 768.79, Florida Statutes (1993) in the amount of $3 million. (R. 33-34) Pirelli did not accept the demand. Plaintiff obtained a judgment for $5,402,089.45. (R. 571-73)

This appeal concerns the award of attorneys' fees. The court found the lodestar to be $414,750.50, which it increased by a multiplier of 2.5 pursuant to <u>Florida Patient's Compensation Fund v. Rowe</u>, 472 So. 2d 1145 (Fla. 1985) and <u>Standard Guar. Ins. Co. v. Quanstrom</u>, 555 So. 2d 828 (Fla. 1990). (R. 3833-50, 4084-86) The court then reduced the award by 25% pursuant to section 768.79(7)(b), resulting in a total fee award of $777,675.95. (R. 4084-86) The court also added $183,200.96 in prejudgment interest. (R. 4086)

Pirelli appealed challenging the court's imposition of an inflated attorneys' fee in a case where its failure to settle was eminently reasonable. Pirelli contended that this was the textbook case in which the Legislature and Supreme Court intended the non-settling defendant to pay a reduced fee, rather than an enhanced award.

The Second District affirmed, but certified to this Court the issue as to whether the application of a contingent risk multiplier to an award of attorneys' fees under section 768.79 violated the doctrine of equal protection.

STATEMENT OF THE FACTS

A. Background

On December 18, 1993, Alwin Jensen was operating his van with his wife, Virginia Jensen as a passenger, when the vehicle went out of control and flipped over. (R. 1-15) The van was then struck by a second vehicle. (R. 1-15) Alwin and Virginia Jensen were killed. (R. 1-15) Less than four months after the accident, Meta Jensen, as personal representative of the estate of Alwin Jensen and as guardian of the Jensens' minor child, filed suit against Pirelli, alleging the accident was caused by a defect in one of the tires. (R. 1-15)

[1]

Seven months after the accident, Plaintiffs served a $3 million demand for judgment pursuant to section 768.79. (R. 33-34) Because the lawsuit was pending only three months and discovery had barely commenced, Pirelli filed a motion requesting the time to respond be enlarged until 10 days after the completion of discovery. (R. 35-38)

The court granted Pirelli's motion in part, ruling that Defendant must respond on or before November 30, 1994. In fact, discovery was not scheduled to conclude until January 27, 1995 and it did not actually end until February 24, 1995, a mere three days before trial. (R. 2565-67)

B. Status of Discovery and Claim While Demand was Pending.

Because of the limited time between the accident, the filing

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[1] Although represented by the same attorney, the personal representative of Virginia Jensen's estate, initiated a separate suit in federal court. A number of other suits were also filed. All have been settled.

of the lawsuit and the demand, very little was known about the claim while the demand was open. Pirelli was not given the tire to inspect until August 1994, and the attorney general's office did not release the Florida Highway Patrol Traffic Homicide Report containing the names of 39 fact witnesses from whom discovery could be sought until September 1994. (R. 1991-1992) Written discovery was also in its earliest stages. As of the date of the offer, although Pirelli had responded to Plaintiffs' initial discovery, Plaintiffs had not yet responded to Pirelli's initial discovery. (See, e.g., R. 31-32, 41-43, 3881-82)

While the demand was pending, Plaintiffs' expert was Max Nonnamaker, an individual well known in the tire industry. On August 28, 1994, Plaintiffs provided Pirelli with Nonnamaker's report in which he opined that the subject tire contained a manufacturing defect. (R. 2513-18, 2523-24) Plaintiffs' other discovery during this time frame also focused on the manufacturing defect theory. (R. 1995)

Nonnamaker's reports did not contain opinions concerning failure to warn or a design defect. (R. 1990) Nor did Plaintiffs identify any other experts to testify on these issues. (R. 1994) Thus, based on the limited information available and Pirelli's familiarity with Plaintiffs' sole expert and his theory, Pirelli did not accept Plaintiffs' substantial demand.

C. **Status of Claim After Demand Expired**.

After the time expired for responding to the offer of judgment, Plaintiffs changed their entire theory of the case. Plaintiffs eliminated Nonnamaker and replaced him with Rex Grogan. (R. 2004) Grogan rejected a manufacturing defect theory and instead opined that there was a design defect in the tire which allowed water to intrude into the steel belt. (T. 644) Based on later-produced time sheets, Plaintiffs' counsel had contacted Grogan before the time to respond to the demand for judgment had expired, but did not disclose his name until after November 30, 1994. (R. 589-92)

On January 16, 1995, ten days after the deadline for identifying experts pursuant to the pretrial order, Plaintiffs served an addendum to their witness list which included the name, "Kenneth Laughery." (R. 59-61, 2010) Three days later, when defense counsel inquired about this addendum, Plaintiffs' counsel represented that the witnesses were Pirelli employees. (R. 101) Later that day, Plaintiffs' counsel faxed a letter to Pirelli's counsel indicating that Mr. Laughery may be called as a witness on warnings. (R. 113) Pirelli filed a Motion to Strike Plaintiffs' Expert or, in the Alternative, Motion to Continue Trial arguing inter alia, that Plaintiffs were late in their disclosure of Dr. Laughery, they had hidden the expert's name in the middle of a list of Pirelli employees, and they did not identify him as an expert or even a Ph.D. (R. 97-113) Pirelli's motion was denied. (R. 1479-80)

D. **Outcome of Trial**.

On February 27, 1995, the case proceeded to trial based on the testimony of Rex Grogan and Kenneth Laughery. Since Plaintiffs had abandoned their manufacturing defect claim, the court granted a directed verdict on that theory. (T. 1120-21) The court also directed a verdict as to Plaintiffs' inadequate warnings claim. (T. 1681-82) Thus, the case was only submitted to the jury on the theories of design defect and absence of warnings. (T. 1681-82) Although the jury found no design defect, it found Pirelli negligent in "failing to warn of a dangerous propensity in the tire." (R. 439-41)

E. **The Attorneys' Fee Dispute**.

After trial, Plaintiffs filed a Motion to Tax Reasonable Costs Including Investigative Expenses and Attorneys' Fees. (R. 576-624) The court entered an order finding entitlement to fees on August 25, 1995. (R.1360-61)

The parties then disagreed on whether a contingency risk multiplier could be considered as a method to increase the lodestar. The court found that use of a multiplier was not precluded by the offer of judgment statute and thus, concluded that it would take evidence on the issue. (S.T. 39)

F. **Plaintiffs' Evidence in Support of Their Claimed Fee Award**.

A number of hearings were conducted to determine the amount of fees. (S.T. 40-459; R. 3405-40) Plaintiffs argued that the appropriate lodestar was $528,435.50 based on 2400 hours of work.[2] (R. 3561) Plaintiffs further claimed that this lodestar should be increased by a contingent risk multiplier of 2.5 with no reduction for the factors enumerated in section 768.79. (S.T. 120, 128)

On the issue of the multiplier, Plaintiff’s attorneys’ fees expert Dale Swope, claimed that personal injury lawyers in Tampa would only take the case if given a percentage of the award and he could not "imagine that someone would take the case with the idea that they would charge straight hourly rates, but only if they won." (S.T. 113) He also testified that litigation of this case could cost $100,000. In his view, the estate had insufficient assets to risk a loss that left the child no means of support. (S.T. 114) Thus, the only reasonable approach was to retain counsel on a contingent fee basis. (S.T. 115)

Swope further noted the fee arrangement was a standard contingent fee contract and that there were substantial time limitations imposed by this type of case which would preclude counsel from taking other cases. (S.T. 116-17) Swope also opined that there was a substantial risk that Plaintiffs would lose.

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[2] Pirelli vigorously challenged this amount. Ultimately, the court reduced Plaintiffs' requested lodestar to $414,750.50. Pirelli has not challenged this finding, and thus, the evidence directed to the lodestar has not been included in this statement of facts.

(S.T. 117) In his opinion, Plaintiffs' case only improved when a defense expert testified a consumer should inspect a tire after hitting a pothole, but the manufacturer failed to provide a warning to this effect. (S.T. 139) Finally, Swope opined that "the results obtained were outstanding." (S.T. 118)

Taking the foregoing information into account, Swope believed that the maximum multiplier of 2.5 should be awarded:

> This was a case which was probably at the outset of this case and the time the offer of judgment was made, if I could of picked sides, I probably would have picked the defendant's side in this case if I was going to be a betting man. I probably would of picked sides with the defendant. It was not likely to have been won. It had a big issue on whether the plaintiff could get past the first question. It had a big issue on comparative negligence. It had a huge issue on <u>Fabre</u> offset particularly with respect to the father's claim, so I felt that was probably, to use the language of the case, the success was unlikely at the time the offer of judgment was made. (S.T. 120)

Thereafter, Swope looked to the factors set forth in section 768.79 and concluded that, "on balance," they did not require any adjustment to the fee. (S.T. 122) Although he believed "success was unlikely" under <u>Rowe</u>, he distinguished that from "merit" as defined by section 768.79:

> I can only assume they do mean [merit] to be different from the likelihood of success. The likelihood of success was purely at the question of liability. The merit of this case went beyond the liability likelihood and so on the merit of this case includes the fact of how the damages were, how large the damages were in this case.
>
> This is a case that cried out for representation. It cried out to be handled because a child had lost both parents, number

> one; the damages are enormous, number two. Number three, if there was a problem with this tire, then its probably a problem that exists with many tires that Pirelli made and there may be lives to be saved in the future from getting to the bottom of what caused this tire to be made. And number four, something was probably, probably wrong with this tire to have caused it to suddenly fail after being put into service just a few days beforehand. So, at the time the case was brought and at the time the offer of judgment was made, while the likelihood of success was less than 50%, the merit in the overall claim I felt was extremely high. (S.T. 123)

Next, on the issue of the closeness of questions of law and fact, Swope testified:

> I felt this case did have close questions of fact and law. Particularly before the defendant's expert gave his deposition in January of 1995 that dramatically enhanced plaintiff's chances. Up until that point in time, I think the plaintiff's case was a very difficult case and they were going to be very close questions. I don't think the warnings case could of been won to my humble judgment without the testimony of defendant's expert. It was essentially a gift. So I felt that was a depressing element there. (S.T. 124-25)

Swope found no information had been unreasonably withheld. In his view, both parties had invested intensive investigative efforts and "the defense got an extension all the way through November." (S.T. 125) Moreover, he believed that Pirelli knew about their own warnings before the demand was made. (S.T. 125)

Finally, Swope purported to distinguish the recent decision in <u>TGI Friday's, Inc. v. Dvorak</u>, 663 So. 2d 606 (Fla. 1995), wherein this Court had described a scenario in which the fee should be reduced from the lodestar:

> We don't have here a case with a small liability potential. We have a case that is more likely than not at the time the offer was

going to be — going to the defendant, but we don't have a small liability potential and we also do not have, to my judgment in light of the risk, we do not have a large settlement offer. (S.T. 128)

G. **Defendant's Evidence in Opposition to Plaintiffs' Claimed Fee Award**.

Defendant's position was that the lodestar should be $345,637 based on 1800 hours. (R. 3633) Pirelli's expert, Bill Gillen, observed that under Dvorak, this was a case where there were large potential damages, but a small liability risk and thus, Pirelli should pay a reduced fee of 50% of the lodestar. (S.T. 199, 225)

Unlike Swope, Gillen began by considering the six factors enumerated in section 768.79. He opined that there was little merit in Plaintiffs' claim when the demand was made since the theory pursued at that time was ultimately abandoned and Pirelli obtained a directed verdict. (S.T. 202) Plaintiffs had not pursued the additional theories of design defect and/or warnings during the time the demand was open. (S.T. 202-03)

As to "the number and nature of the offers," Gillen noted that after making demands of $3 million in each of the parent's cases, Plaintiffs' counsel then made a joint demand for $10 million. (S.T. 204) This suggested that the demands were moving away from any possibility of settlement. (S.T. 204)

The third factor considered was the closeness of questions of fact and law. (S.T. 206) In his view, the issues were obviously very close since: (1) Pirelli obtained a directed verdict on the only theory identified while the offer was open, (2) the court directed a verdict on the inadequate warnings theory, and (3) the jury resolved the design defect issue in Pirelli's favor. (S.T.

206-09) The only theory upon which Plaintiffs prevailed was the absence of a particular warning. (S.T. 209)

The last factor evaluated by Gillen was whether Plaintiffs had unreasonably refused to furnish information necessary to evaluate the reasonableness of the offer. (S.T. 209) In his view, Plaintiffs unreasonably withheld information concerning their warnings expert, Dr. Laughery. (S.T. 212)

Gillen next considered the applicability of a contingent risk multiplier as an additional factor. (S.T. 214) According to Gillen, there was no evidence presented by Plaintiffs to support a threshold determination that a multiplier should be applied. (S.T. 217-20) For example, there was no evidence Plaintiffs' counsel was precluded from pursuing other legal work because of the decision to take the Jensen case as a contingent fee matter. (S.T. 220) Nor was there evidence that Plaintiffs could not mitigate the risk of nonpayment or that the relevant market requires a contingent fee multiplier to obtain competent counsel. (S.T. 216-17) Accordingly, Gillen did not believe the two threshold inquiries set forth in Quanstrom had been met. (S.T. 217)

Nonetheless, Gillen analyzed the contingency risk factor and concluded that "in a vacuum" the multiplier would be high because of the questionable liability and minimal likelihood of success. (S.T. 221) However, Gillen explained that there was an inconsistency between the multiplier approach and section 768.79 because the same factors that cause an increase under Quanstrom, would cause a decrease under the statute. (S.T. 222)

On the other hand, Gillen opined that the results obtained

would not justify an increase. Rowe provides that the "results obtained" must consider the success of some claims as well as the lack of success on other claims. 472 So. 2d at 1151. Here, Plaintiffs were unsuccessful on most of their claims. (S.T. 223) The only theory upon which they were successful was a "no warnings" claim that arose at the "eleventh and a half hour." (S.T. 224)

Combining the two Rowe factors, Gillen concluded:

> So on a whole, even if we get over the threshold of considering the contingency risk factor, I think these two [the likelihood of success and the result obtained] balance out and that its just not a factor.
>
> Plus its only, at best — accepting this court's ruling and the court in Collins [v. Wilkins, 664 So. 2d 14 (Fla. 4th DCA 1995)] ruling, — one-seventh of the situation anyway. So, after going through the entire contingency analysis, I really don't think it played a great role in the determination. (S.T. 224-25)

Ultimately, Gillen opined that the lodestar should be reduced by at least 50% because:

> [a]s of the time of the expiration of the offer, with the only theory of the case being manufacturing, Pirelli was confident in that.
>
> And I just think if we look at the whole thing, particularly the Dvorak decision, I think that lodestar should be reduced by 50 percent, and I don't think the consideration of the contingency fee factor should change that.
>
> What Pirelli did in this case was they took a case to trial that they felt they could win; but if they lost, they knew they would be facing significant damages. And they had their day in court, and I don't think the totality of those cases indicate that they should be slammed or sent to the cheat sheets just because they took that position.

> It is the exact opposite being true that I don't think Ms. Jensen should have paid a huge claim had a smaller offer of judgment been entered that was beat. (S.T. 225-26)

H. The Trial Court's Ruling

On April 1, 1997, the court heard arguments on Plaintiffs' motion for attorneys' fees and ordered the parties to file proposed findings of fact and conclusions of law. (S.T. 330-459; R. 3554-3571, 3572-3633) Thereafter, on October 3, 1997, the court entered its order awarding fees. (R. 3833-50) The court concluded that the proper methodology was to determine a lodestar, then perform an analysis pursuant to Rowe and Quanstrom, and finally look to the statutory factors for final "adjustments." (R. 3848)

As to the Rowe/Quanstrom analysis, the court found that the relevant market required a risk multiplier, there was no way that the attorney could mitigate the risk of nonpayment, the amount involved was significant, the result obtained was excellent and the fee arrangement was contingent. (R. 3842-3) Because the court found no disagreement among the experts in that both concluded that success was "unlikely" at the outset of the case, the court awarded the highest multiplier available - 2.5. (R. 3843)

The court next considered the statutory factors and agreed with Pirelli's assessment of the merit of Plaintiffs' claim:

> This is a case wherein the defendant when initially faced with a small damage potential rejected a large demand for judgment. The verdict, which exceeded the demand for judgment by more than 25 percent, was, as noted, due in large part to circumstances which had changed since the rejection of the demand. Given the then apparent lack of merit of the case as pled, it cannot be said that the amount of the demand accurately reflected the settlement value of the case as of the

> time of the demand. Thus, as suggested by the Florida Supreme Court in TGI Friday's, Inc. v. Dvorak, 663 So. 2d 606 (Fla. 1995), even though the verdict clearly exceeded the demand for judgment by more than 25 percent, the fee which the defendant should be obliged to pay should be reduced because of the unique circumstances presented.

(R. 3844) The court found the remaining factors had no influence in adjusting the award either upward or downward. (R. 3845-6).

The final step in the court's analysis was to determine the amount of the reduction pursuant to section 768.79. Noting that the Supreme Court has provided no guidance for trial courts in arriving at the mathematical calculation of a reduced fee award, the court again turned to Dvorak:

> [T]he [Supreme] Court acknowledged that a "court could reasonably conclude that a Defendant with a small liability potential who rejected a large settlement offer should pay only a reduced fee even though the verdict ultimately exceeded the offer by more than twenty-five percent." [Dvorak at 613] That is the essence of Defendant's arguments herein i.e., that it should not be punished for rejecting a demand when it reasonably believed that liability was "slight." The argument is rather compelling. The instant case does appear to present the type of situation to which the Supreme Court was referring when discussing when a reduction in the amount of fees awarded would be warranted. In applying this rational to all of the circumstances presented by this complex and tragic litigation, the court finds that the final attorneys' fee award herein should be reduced by 25 percent.

(R. 3848-9)

I. **Appeal to the Second District**

Pirelli appealed to the Second District arguing that the use of a multiplier in the context of the offer of judgment statute was improper, that even if considered, the multiplier was improperly applied and finally, that the trial court abused its discretion in awarding an enhanced fee.

Agreeing with the Fourth and Fifth Districts, the majority ruled that a multiplier could be considered. Pirelli Armstrong Tire Corp. v. Jensen, 752 So. 2d 1275 (Fla. 2d DCA 2000).

Judge Casanueva dissented, concluding that the use of a multiplier in the context of section 768.79 violated defendant's right to equal protection because it sanctions a defendant who unreasonably rejects an offer, while prohibiting the same sanction on a plaintiff. Because the court could discern no rational basis for treating plaintiffs and defendants differently, Judge Casanueva found the statute to be unconstitutional. Moreover, the dissent concluded that Rowe and Quanstrom involved fee-shifting statutes which was not the case here. Finally, he observed that section 768.79 did not expressly provide judicial authority to use a multiplier.

On rehearing, the Court certified the following question to this Court:

> WHETHER THE APPLICATION OF A CONTINGENCY RISK MULTIPLIER TO AN AWARD OF ATTORNEY'S FEES UNDER SECTION 768.79, FLORIDA STATUTES (1993), THE OFFER OF JUDGMENT STATUTE, VIOLATE THE GUARANTEE OF EQUAL PROTECTION AFFORDED UNDER THE UNITED STATES OR FLORIDA CONSTITUTION?

SUMMARY OF THE ARGUMENT

This case presents an issue of first impression in this Court concerning the propriety of applying a contingent risk multiplier to enhance a fee award made pursuant to section 768.79. It also involves the issue of the proper reduction of fees where it is shown that the rejection of a demand for judgment was reasonable.

The fee-authorizing statute, 768.79, identifies the specific criteria to be considered and, therefore, the court's analysis is limited to those factors. See Schick v. Department of Agric. and Consumer Servs., 599 So. 2d 641 (Fla. 1992). As such, the very terms of the authorizing statute do not authorize the use of a contingent risk multiplier.

Moreover, the use of a contingent risk multiplier is inconsistent with the legislative purpose behind section 768.79 because the very factors which would increase an award pursuant to an analysis of a contingent risk multiplier, would result in a decreased award pursuant to the offer of judgment statute. Accordingly, based on the language of section 768.79, as well as its purpose, it was error to consider a contingent risk multiplier.

Indeed, it is the lack of any rational relationship between the statute's purpose and the application of a contingent risk multiplier that gives rise to an equal protection violation. While in some cases, there is a rational basis to allow a multiplier. In this case, however, there is no rational relationship between that arbitrary classification and the purpose of section 768.79. In this circumstance, Pirelli is denied the equal protection of the laws.

Even if this Court were to conclude that consideration of a

contingent risk multiplier was not precluded as a matter of law, it was error to consider a multiplier under the facts of this case because Plaintiffs did not establish that the relevant market required a multiplier. Indeed, in cases seeking attorney's fees under the offer of judgment statute, the attorney for the plaintiff could not anticipate **at the time the representation commences** that a contingent fee multiplier would be available. Hence, the decision to take the case could not turn on that factor. See Gonzalez v. Veloso, 731 So. 2d 63, 64 n.2 (Fla. 3d DCA 1999).

Finally, assuming a multiplier could even be considered, the court improperly interpreted the "results obtained" as an enhancing factor when in fact it may only serve to decrease the award. It also improperly elevated consideration of the multiplier over the statutory factors. And, ultimately, it is readily apparent that the trial court abused its discretion in failing to award a reduced fee. The Supreme Court in TGI Friday's, Inc. v. Dvorak, 663 So. 2d 606 (Fla. 1995) described the circumstances in which a fee should be reduced. This case falls squarely within the scenario described by the Court. It is undisputed that at the time the demand for judgment was pending, Plaintiffs had little or no chance of succeeding with his claim. After the time expired for responding to the demand for judgment, Plaintiffs' entire theory changed and for the first time Plaintiffs had an opportunity to prevail. The trial court simply lost sight of the purpose behind section 768.79 which was to promote settlement and not to penalize parties for reasonable refusals to settle.

Accordingly, Pirelli respectfully requests this Court enter an

order reversing attorneys' fee award in total or reversing the judgment with directions to award fees in accordance with the statutory factors set forth in section 768.79.

ARGUMENT

I. THE COURT ERRED BY CONSIDERING A CONTINGENT RISK MULTIPLIER IN THE CONTEXT OF A FEE AWARD UNDER THE OFFER OF JUDGMENT STATUTE.

After finding an entitlement to fees, the trial court and Second District concluded that it must consider the application of a multiplier pursuant to Florida Patient's Compensation Fund v. Rowe, 472 So. 2d 1145 (Fla. 1985) and Standard Guar. Ins. Co. v. Quanstrom, 555 So. 2d 828 (Fla. 1990).

[3] Although the certified question relates specifically to the doctrine of equal protection, that analysis can only be conducted in the context of the particular statute under scrutiny.

The plain meaning of the offer of judgment statute does not allow for the use of a contingent risk multiplier in determining a proper fee award. As such, it is clear that the Legislature did not sanction the use of a multiplier in awarding attorney's fees to a plaintiff pursuant to an offer of judgment.

But even if one assumes, as the district court did, that the statutory phrase "along with all other relevant criteria" and a general reference to **all** of the guidelines promulgated by the Supreme Court were enough to authorize the use of a multiplier for plaintiffs **only**, such a reading of the statute is at odds with the legislative purpose behind the statute. The statute was designed to "encourage the terminating of litigation". It thus strains credibility to read the statute so as to "encourage[] the bringing of a civil action" by "enhance[ing] the [attorney's fee]

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[3] The determination as to whether a contingent risk multiplier is applicable is a legal issue for the court. See Albert v. Goldman-Link, 661 So. 2d 1293 (Fla. 4th DCA 1995).

award in such a generous manner." Pirelli Armstrong, 752 So. 2d at 1276-77 (quoting from both the dissenting and majority opinions). Moreover, it would allow an award to be enhanced based on the very factors that the Legislature has determined should result in a reduced award.

It is precisely this disconnect between the legislation's purpose and its blatantly discriminatory classification between plaintiffs and defendants, that results in a denial of equal protection. Consequently, the district court's conclusion, based on these fundamental errors must be reversed.

A. The Applicable Fee-Authorizing Statute does not Include the Contingent Risk Multiplier as Criteria to be Considered.

In Quanstrom, this Court sought to explain and redefine the manner in which a contingent risk multiplier may be considered and applied. After identifying the relevant factors to be considered, the Court noted as follows:

> In [tort and contract cases], the legislature may be very specific in setting the criteria that can be considered. For example, deputy commissioners must apply specific criteria to determine attorney's fees in workers' compensation cases. In this regard, the lodestar method is consequently unnecessary. It is not our intent to change the law in those instances.

555 So. 2d at 835 (citations omitted).

Applying this language to section 73.091, in an inverse condemnation proceeding, this Court in Schick v. Department of Agric. and Consumer Servs., 599 So. 2d 641 (Fla. 1992) held:

> Where, as here, the legislature specifically sets forth the criteria it deems will result in a reasonable award and will further the

> purpose of the fee-authorizing statute, only the enumerated factors will be considered.

Id. at 644.

The Court further explained:

> [t]he legislature has specifically included in section 73.092 the criteria to be considered in awarding attorney's fees pursuant to section 73.091 and neither the contingent nature of the fee arrangement nor the risk of nonpayment of fees is an authorized consideration. We therefore . . . hold that in determining the reasonableness of an attorney's fee award, made pursuant to section 73.091 . . . a Rowe contingency risk multiplier should not be utilized.

Id. at 643.

The Third District reached the same result in the context of section 766.31 in Birth-Related Neurological Injury Compensation Ass'n v. Carreras, 633 So. 2d 1103 (Fla. 3d DCA 1994). The statute at issue in Carreras listed a number of factors including "the contingency or certainty of a fee." § 766.31(1)(c)(6). Citing Schick, the court noted that the trial court correctly limited itself to the statutory factors. The fact that the statute included "the contingency or certainty of a fee" did not mean that the case was "eligible for a Quanstrom contingency multiplier." 633 So. 2d at 1106.

In Richardson v. Merkle, 646 So. 2d 289 (Fla. 2d DCA 1994), the Second District held that a contingency risk multiplier should not be applied to an award of fees based on section 57.105, Florida Statutes. See also TransFlorida Bank v. Miller, 576 So. 2d 752 (Fla. 4th DCA 1991). Similarly, in Stewart Select Cars, Inc. v. Moore, 619 So. 2d 1037 (Fla. 4th DCA 1993) , the Fourth District held that because the fee-authorizing statute, section 501.215,

provided for reasonable fees "for the hours actually spent on the case," the use of a contingent risk multiplier was inappropriate. Id. at 1038.

Finally, the use of a multiplier was rejected in the context of workers' compensation attorneys' fee statute, section 440.34, Florida Statutes. See Mirisena v. Chemlawn Corp., 567 So. 2d 986 (Fla. 1st DCA 1990); What an Idea, Inc. v. Sitko, 505 So. 2d 497 (Fla. 1st DCA 1987). Cf. Cheung v. Executive China Doral, Inc., 638 So. 2d 82 (Fla. 3d DCA 1994), disagreed with on other grounds, Berry v. Scotty's, Inc., No. 97-00355, 1998 WL 161498 (Fla. 2d DCA Apr. 8, 1998) (because section 443.041(2)(b) does not include criteria by which to determine the amount of fees, resort to Rowe and Quanstrom is proper).

Applying the foregoing well-established law, it was error for the court to apply a contingent risk multiplier in this case. Like the statutes described in Quanstrom, Schick, Stewart, and Carreras, section 768.79(7)(b) enumerates specific criteria to be considered and thus, those are the criteria by which the court must be guided. [4]

Rejecting Pirelli's argument below, the Second District accepted the decisions of the Fourth and Fifth Districts in Garrett v. Mohammed, 686 So. 2d 629 (Fla. 5th DCA 1996) and Collins v. Wilkins, 664 So. 2d 14 (Fla. 4th DCA 1995), to the effect that the statute's reference to "other relevant criteria"

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[4] Indeed, it is noteworthy that in Dvorak, this Court looked at the statutory factors only and never suggested the use of a multiplier.

and to the guidelines promulgated by the Supreme Court indicated that a multiplier was appropriate. As the dissent in this case correctly points out, these courts are wrong.

Section 768.79(6)(b) merely states that reasonable attorneys' fees are calculated in accordance with the guidelines promulgated by the Supreme Court. As explained in Rowe and Quanstrom, those guidelines, as set forth in Florida Rule of Professional Conduct 4-1.5 and Florida Bar Code of Professional Responsibility DR 2-106(B), address the calculation of reasonable rates and numbers of hours; i.e., the lodestar. Quanstrom, 555 So. 2d at 830. Thus, the Supreme Court's guidelines are implicit in **any** calculation of a reasonable fee.

On the other hand, the fact that those guidelines include consideration as to whether there is a contingency arrangement does not authorize the court to apply a contingent risk multiplier. Indeed, in Carreras, 633 So. 2d at 1106, the Third District concluded that even though the fee-authorizing statute identified contingency of the risk as a factor, this did not mean that the fee was eligible for a multiplier. Similarly, the attorneys' fee statute for workers' compensation claims, section 440.34, Florida Statutes, included the same criteria, yet a multiplier was not permitted. See Mirisena, 567 So. 2d at 986; Sitko, 505 So. 2d at 497.

Moreover, while section 768.79(7)(b) provides that the court may consider "other relevant criteria", the contingent risk multiplier is not a "relevant criteria" because, as discussed infra, its use would be inconsistent with the purpose behind the

fee-authorizing statute. Thus, the language of section 768.79(7)(b) does not expand the statutory criteria to include a multiplier.

B. Consideration of a Multiplier is Inherently Inconsistent With the Purpose Behind Section 768.79.

Even assuming arguendo that the plain words of the statute allowed for the use of a multiplier, such an interpretation of the statute is plainly at odds with the legislative purpose behind the statute and as such, cannot stand.

It is well established that "laws should be enforced with common sense and applied without losing sight of the legislative purpose behind their enactment." Mackey v. Household Bank, F.S.B., 677 So. 2d 1295, 1298 (Fla. 4th DCA 1996). See also Alderman v. Unemployment Appeals Comm'n, 664 So. 2d 1160, 1161 (Fla. 5th DCA 1995) (statutes must be interpreted "to facilitate the achievement of their goals in accordance with reason and common sense"); Amente v. Newman, 653 So. 2d 1030, 1032 (Fla. 1995)("If possible, the courts should avoid a statutory interpretation which leads to an absurd result."). Thus, where a statute can be given more than one interpretation, "the one that will sustain its validity should be given and not the one that will destroy the purpose of the statute." City of St. Petersburg v. Siebold, 48 So. 2d 291, 294 (Fla. 1950). "To do otherwise is to generate disrespect for the law by creating a morass of technical regulations with no connection to human experience." Mackey, 677 So. 2d at 1298.

Applying these settled rules of construction, it is clear that a contingent fee multiplier may not be employed where attorneys'

fees are premised on section 768.79 because its application would be inconsistent with the purpose and policy behind section 768.79.

In Quanstrom, the court "emphasize[d] that the criteria and factors utilized in [tort] cases must be consistent with the purpose of the fee-authorizing statute or rule." 555 So. 2d at 834. Indeed, the principle guiding force must be the fee-authorizing statute; otherwise, the purpose behind the fee-authorizing statute will have been wholly eviscerated. Id. at 834. See also American Reliance Ins. Co. v. Nuell, Baron & Polsky, 654 So. 2d 289 (Fla. 3d DCA 1995) (court refused to allow multiplier to be applied to attorney who represents himself given that such a rule would promote attorney self-representation which is not favored). As such, any analysis of the fee award must begin with the fee-authorizing statute.

In his dissenting opinion, Judge Casanueva accurately described the statute's purpose:

> Both the legislative history and the judicial interpretation of section 768.79 suggest that its purpose is to encourage the resolution of litigation. In Eagleman v. Eagleman, 673 So. 2d 946, 947 (Fla. 4th DCA 1996) (citations omitted), the Fourth District noted:
>
> > The spirit of the offer of judgment statute is to encourage litigants to resolve cases early to avoid incurring substantial amounts of court costs and attorney's fees. It serves as a penalty for parties who fail to act reasonably and in good faith in settling lawsuits.
>
> The legislative history for chapter law 86-160 supports the Fourth District's conclusion. The staff analysis prepared by the Florida House of Representative's Committee on Judiciary for House Bill 321 stated that the proposed

> "legislation would provide sanctions for the unreasonable rejection of an offer of settlement given by either a defendant or plaintiff." Sanctions were to include attorneys' fees. The sanctions provided for by HB 321 would encourage settlement of civil cases which could, in turn, "result in lower litigation costs." Similarly, the Senate Staff Analysis and Economic Impact Statement prepared for Senate Bill 866 indicates the bill's purpose was to expand the offer of judgment concept "to encourage settlements between parties."

Pirelli Armstrong, 752 So. 2d at 1277-78 (Casanueva, J., concurring in part, dissenting in part). Thus, the statute serves as a penalty for parties who fail to act reasonably and in good faith in settling lawsuits.

Given this purpose, if a party has been unreasonable in rejecting a settlement, as where the chances of a liability finding are high (a situation where a multiplier would never be appropriate) and the demand is reasonable, a court may find that a lodestar should be increased pursuant to the criteria set forth in section 768.79. On the other hand, where defendant’s liability is remote, it becomes more reasonable for that defendant to reject a high offer. In that circumstance, this Court in Dvorak noted that the award is justifiably reduced:

> Thus, in a given case, the court could justifiably reduce the amount of the attorney’s fee to be assessed against a severely injured plaintiff who suffered an adverse verdict after rejecting a small settlement offer. By the same token, the court could reasonably conclude that a defendant with a small liability potential who rejected a large settlement offer should pay only a reduced fee even though the verdict ultimately exceeded the offer by more than twenty-five percent.

Id. at 613.

In contrast, the contingent risk multiplier rewards counsel for being successful in representing a plaintiff in a difficult case. As a result, a case which has little "merit" thereby justifying the rejection of a high demand for judgment, would result in a high multiplier because of the risk involved. Similarly, the closeness of questions of law and fact would decrease the award under section 768.79, but increase the multiplier. In short, the same factors which would lower an award pursuant to section 768.79, will enhance the award under Rowe and Quanstrom.

[5]

The majority below does not dispute this view of the legislative purpose. Instead, it rests on a too-literal reading of the statute. Legislative purpose (and in this case, the related legislative intent) cannot be so thwarted. See Vildibill v. Johnson, 492 So. 2d 1047, 1049 (Fla. 1986)("Legislative intent must be given effect even though it may contradict the strict letter of the statute.").

Accordingly, this Court is compelled by the language of section 768.79, as well as by its purpose, to reject the use of a contingent risk multiplier in this circumstance.

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[5] Garrett and Collins failed to consider the purpose behind section 768.79 and the inherent inconsistency between the two approaches to calculating an attorneys' fee award. When these overriding policy considerations are taken into account, it is clear that Garrett and Collins were incorrectly decided.

C. Use of a Multiplier in the Context of the Offer of Judgment Statute Constitutes a Denial of Equal Protection.

By its very nature, a multiplier is only available to the plaintiff because that is the party which avails itself of the contingent fee arrangement. Clearly there are many circumstances where the plaintiff's ability to use a multiplier bears a rationale relationship to the legislative purpose of the authorizing statute and thus, its use is appropriate. Here, however, the use of a multiplier results in grossly disparate treatment depending upon who makes the offer/demand and does so without any relationship to the purpose of the statute. For instance, if a case has low merit, but a high damage potential and a demand is made by a plaintiff, the fee allowed, as here, could be well in excess of the lodestar. However, if the offer is made by defendant who would not be entitled to a multiplier, it would result in a reduced fee. Such a result is illogical, however, given that the purpose of the statute is the same regardless of who made the demand or offer. As a result, the blatantly discriminatory classification between plaintiffs and defendants is an unconstitutional denial of equal protection in this circumstance.

The Fourteenth Amendment to the United States Constitution promises that no State shall "deny to any person within its jurisdiction the equal protection of the laws."
[6] At the very least, this guaranty must mean that government

[6] Both the Florida and the United States Constitutions guaranty the equal protection of the laws. See Fla. Const. art. I, § 2; U.S. Const. Amend. 14. And the district court certified its question directed to both constitutions. The Florida Constitution, however, uses the terminology: "All natural persons, female and male alike, are equal before the law . . . ." While the federal and state legal standards are quite similar, Pirelli will focus on federal law. See Santa Clara County v. Southern Pacific R.R., 118 U.S. 394 (1886)(Chief Justice Waite indicates that no justice

cannot draw arbitrary classifications among persons that promote no related government purpose. See Joseph Tussman & Jacobus tenBroek, The Equal Protection of the Laws, 37 Cal. L. Rev. 341 (1949)(the Equal Protection Clause limits the legislature's freedom of classification).

The legal standard is clear: the statute must be rationally related to the achievement of a legitimate legislative objective. See Heller v. Doe, 509 U.S. 312, 319-20 (1993); Dandridge v. Williams, 397 U.S. 471 (1970); F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920) (different classifications of persons "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.").

Using this federal equal protection standard as a guide, Justice Kennedy has made it quite plain that the irrational favoritism of one group (here, plaintiffs) over another group (here, defendants) will not withstand constitutional scrutiny. Specifically, he found:

> [E]ven in the ordinary equal protection case calling for the most deferential of standards, we insist on knowing the relation between the classification adopted and the object to be attained. The search for the link between classification and objective gives substance to the Equal Protection Clause; it provides guidance and discipline for the legislature, which is entitled to know what sorts of laws it can pass; and it marks the limits of our own authority.

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doubts that Equal Protection Clause applies to corporations).

Romer v. Evans, 517 U.S. 620, 632 (1996)(emphasis supplied).

Justice Kennedy continued as follows:

> Equal protection of the laws is not achieved through indiscriminate imposition of inequalities. Sweatt v. Painter, 339 U.S. 629, 635 (1950) (quoting Shelley v. Kraemer, 334 U.S. 1, 22 (1948)). Respect for this principle explains why laws singling out a certain class of citizens for disfavored legal status or general hardships are rare.

Id. at 633-34.

Finally, in finding that the state constitutional amendment at issue was violative of equal protection principles, Justice Kennedy concluded:

> **It is a status based enactment divorced from any factual context from which we could discern a relationship to legitimate state interests; it is a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit.**

Id. at 636 (emphasis supplied).

In this case, there is no narrow scope or factual context from which this Court could ascertain a relation between the irrational classification (plaintiffs and defendants) and the purpose of the fee-authorizing statute. There can be no dispute that the statute was meant to encourage the termination of litigation. That legislative intent just cannot be reconciled with the use of a contingent risk multiplier. Instead, the construction urged arbitrarily discriminates between plaintiffs and defendants without any factual predicate from the Legislature for doing so.

[7] As such, there is no relationship--much less a rational relationship--between an offer of judgment statute and the availability, to **only** plaintiffs, of a contingency multiplier.

Consistent with the federal courts, this Court has also interpreted statutes by reference to equal protection principles. Indeed, in prohibiting an offered construction of Florida's Wrongful Death Act, Justice Adkins emphasized that while such "a statutory classification" "must only be rationally related to a legitimate state interest," "it cannot be wholly arbitrary." Vildibill, 492 So. 2d at 1050. There, as here, one reading of the literal terms of the statute was asserted to dictate a result that would be at odds with the Constitution. Not only did Justice Adkins mandate that legislative intent be given primacy over a too-literal reading,[8] he also recited the age-old principle that "[i]f a statute may reasonably be construed in more than one manner, this Court is obligated to adopt the construction that comports with the dictates of the Constitution." Id. See also In re Platt, 586 So. 2d 328 (Fla. 1991) (there is no equal protection for the public or the lawyer if we allow a method of assessing attorneys' fees that produce

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[7] See also Sawyer v. Sigler, 320 F. Supp. 690, 698 (D. Neb. 1970), aff'd, 445 F.2d 818 (8th Cir. 1971) ("When a state affords one person a right by statute, it must afford all persons the same right, . . . at least in the absence of some exceptional circumstance based upon an interest by the state in the class of persons constituting the exception").

[8] Cf. Lynch v. Overholser, 369 U.S. 705, 710 (1962)("The decisions of this Court have repeatedly warned against the dangers of an approach to statutory construction that confines itself to the bare words of a statute, for 'literalness may strangle meaning.'" (citations omitted)).

different results for the same type of case, depending on the preference of the trial judge); Penillos v. Cedars of Lebanon Hosp. Corp., 403 So. 2d 365 (Fla. 1981); Georgia S. & Fla. Ry. Co. v. Seven-Up Bottling Co., 175 So. 2d 39, 40 (Fla. 1965)(reciting the purpose of Florida's equal protection clause: "The inhibition that no state shall deprive any person within its jurisdiction of the equal protection of the laws was designed to prevent any person, or class of persons, from being singled out as a special subject for arbitrary and unjust discrimination and hostile legislation." (citations omitted)).

In sum, the courts below would apply the offer of judgment statute's sanctions in a different manner depending on whether the movant for attorney's fees was a plaintiff or a defendant. This is the exact type of unfair treatment that our equal protection jurisprudence is meant to correct.

II. CONSIDERATION OF A MULTIPLIER WAS ERROR UNDER THE FACTS OF THIS CASE.

Even if this Court concludes that consideration of a multiplier is not precluded as a matter of law, it is clear under the facts of this case that a multiplier cannot be used.

In Quanstrom, the Court recognized that the use of a contingency fee multiplier had been effectively eliminated by the United States Supreme Court in Pennsylvania v. Delaware Valley Citizen's Council for Clean Air, 483 U.S. 711 (1987). Accordingly, the Court reexamined the propriety of multipliers and noted that the existence of a contingent fee contract does not automatically justify application of a contingent risk multiplier. 555 So. 2d at

831. In other words, the words "must consider" a multiplier does not mean "apply," but rather means that the court must consider whether or not to apply the contingent fee multiplier. See also Bankers Ins. Co. v. Gonzalez, 545 So. 2d 907 (Fla. 3d DCA 1989) (court is not obligated to adjust the lodestar in every case where a successful prosecution of the claim was unlikely).

To support an award of a multiplier in a tort case, the court must consider: (1) whether the relevant market requires a multiplier to obtain competent counsel, (2) whether the attorney was unable to mitigate the risk of nonpayment, and (3) whether any of the factors set forth in Rowe are applicable especially the amount involved, the result obtained and the type of fee arrangement. Id. at 834. Plaintiffs must present evidence on each of these factors to justify utilization of a multiplier. Id. Plaintiffs did not do so in this case.

A. Plaintiffs Failed to Present Evidence to Support any Adjustment to the Lodestar Based on a Multiplier.

Plaintiffs' expert, Swope, focused solely on the need for a contingent fee contract. He did not, however, present testimony to the effect that a contingent fee multiplier was necessary to obtain counsel. (S.T. 113) Nor did the court provide any basis for its finding that a multiplier was required to obtain counsel.

Because Plaintiffs failed to present evidence to establish that the relevant market required the use of a contingent risk multiplier, the use of a multiplier should be precluded. As this Court recognized in Bell v. U.S.B. Acquisition, 734 So. 2d 403, 409 (Fla. 1999) "the very first factor listed in Quanstrom for courts

to consider in determining if a multiplier should be utilized in tort and contract cases is whether the relevant market requires a contingency fee multiplier to obtain competent counsel."

Similarly, the Fifth District Court of Appeal in Strahan v. Gauldin, 25 Fla. L. Weekly D666 (Fla. 5th DCA Mar. 17, 2000) held:

> Gauldin retained his counsel before any promise of either a multiplier or a fee in excess of that which the ethical rules normally allow. The idea of the use of the multiplier was born in this case only after Strahan rejected a settlement offer of $50,000. The multiplier provides an incentive to a lawyer to represent a client in a case in which few lawyers would venture. The potential use of a multiplier in calculating a fee aids an injured person having a tenuous case to secure competent counsel and improves access to our system of justice. The United States Supreme Court has cautioned, however, that the use of a multiplier can also have the negative social cost of encouraging claimants with non-meritorious claims. City of Burlington v. Dague, 505 U.S. 557, 563, 112 S. Ct. 2638, 120 L. Ed. 2d 449 (1992). We conclude that the multiplier was improperly applied in this case where there was an absence of any evidence indicating that a premium was necessary to obtain competent counsel.

See also Simmons v. Royal Florida Distributors, Inc., 724 So. 2d 99 (Fla. 4th DCA 1998)

Indeed, it would not be possible to present evidence that a multiplier was required because of the nature of this particular fee statute. In most instances, the fee-shifting statutes are based on a prevailing party provision. Thus, at the outset, counsel can evaluate the chances of prevailing and assess the risks and rewards before undertaking the representation. As such, the possibility of enhancement might induce counsel to taken an otherwise risky case.

However, where fees are based on the offer of judgment statute, the promise of enhanced fees does not exist at the time counsel makes the determination whether to take the case. Thus, a potential multiplier is simply not a relevant factor in deciding whether to take a case.

The Third District Court of Appeal recognized this in in Gonzalez v. Veloso, 731 So. 2d 63, 64 n.2 (Fla. 3d DCA 1999):

> Quaere: Whether any such showing can ever be made, and thus whether a multiplier is ever appropriate, when fees are awardable only when a reasonable offer is not accepted under § 768.79, an eventuality which obviously cannot be anticipated when counsel is obtained.

Based on the foregoing, Defendant submits that the trial court erred in considering a multiplier given the absence of proof on the threshold issue of the need for a multiplier to obtain competent counsel.

III. THE COURT ERRED AND/OR ABUSED ITS DISCRETION IN THE MANNER IN WHICH THE FEE AWARD WAS DETERMINED IN THIS CASE.

Based on the analysis above, it is clear that a multiplier should not have been considered in this case. But assuming this Court concludes that the use of a multiplier could at least be considered, then the trial court was obligated to do so in a manner which comported with the statute and underlying policies. Instead, (1) the court improperly interpreted the results obtained as an enhancing factor when it can only be used to decrease an award; (2) the court improperly elevated consideration of the multiplier over the statutory factors; and (3) the court abused its discretion in failing to award a reduced fee under the circumstances of this

case.

A. The Court Erred in its Interpretation of the "Results Obtained."

One of the factors enunciated by the court as support for its decision to enhance the fee award was the "results obtained." The Second District has recently held that this factor cannot be used to increase an attorneys' fee award.

In Alvarado v. Cassarino, 706 So. 2d 380 (Fla. 2d DCA 1998), plaintiffs challenged the court's use of "results obtained" to increase an attorneys' fee award. After careful review of Rowe and Quanstrom, the court concluded that the "results obtained" may only be used to decrease an award. Thus, once the court arrives at a lodestar, it may add to the fee based upon a contingency risk factor or subtract from the fee based on the results obtained. 706 So. 2d at 381. As explained in Rowe, the reduction might occur when the party prevails on a claim for relief, but is unsuccessful on other claims. Rowe, 472 So. 2d 1145 (Fla. 1985).

In the present case, Plaintiffs' expert cited the "results obtained" as a factor in increasing the award. (S.T. 118) In contrast, Pirelli's expert properly looked to the outcome of each of the claims and concluded that Plaintiffs were unsuccessful on most of their claims and were only successful on a "no warnings" claim that arose at the "eleventh and a half hour." (S.T. 224) As such, Pirelli's expert opined this must be a depressing factor.

The court improperly adopted Plaintiffs' approach and used the result obtained to support enhancement. This error, like the others, negates the judgment awarding Plaintiffs' fees based on a

multiplier of 2.5. Alvarado.

B. The Court Improperly Elevated the Contingent Risk Multiplier Over any Other Consideration.

The trial court noted that the contingent risk multiplier is "one criterion which may be applied in determining a reasonable fee under section 768.79." (R. 3848) However, instead of treating it as **one** factor, the court turned it into **the** overriding factor:

> Given the organization of the statute, it is reasonable to assume that the legislature intended for the court to perform a complete Rowe and Quanstrom analysis, including the application of an appropriate multiplier before moving to subsection (7)(b) of the statute for final adjustments, if necessary.

(R. 3848)

But, there is nothing in the language of the statute to suggest that the court should start with a non-referenced factor and then look to the statutory criteria "for final adjustments, if necessary." (R. 3848) To the contrary, the legislature identified specific factors to be examined. Thus, even if the multiplier was a "relevant criteria," it is to be considered "along with" the six enumerated factors. See § 768.79(b), Fla. Stat. See also Carreras, 633 So. 2d at 1107 (where contingency of the risk is identified as one of the criteria, it is just one factor to be weighed with all others).

Dvorak supports this conclusion. The Court indicated that the enumerated factors are intended to be considered in the determination of the amount of the fee awarded. The Court did not include a preliminary determination based on Rowe and Quanstrom, as was done by the court in this case.

Moreover, even in the cases in which a multiplier was used to award fees pursuant to section 768.79, the courts did not elevate the multiplier over other criteria. To the contrary, the court in Collins noted that the "legislature authorized a trial court to consider the application of a contingency risk multiplier as **one criterion** which may be applied in determining a reasonable fee under section 768.79." 664 So. 2d at 15 (emphasis added).

Finally, the policy considerations underlying section 768.79 are obliterated if a court conducts a Rowe and Quanstrom analysis and then "adjusts" the award "if necessary." This can be easily seen by considering the scenario cited in Dvorak. Therein, this Court observed that where a defendant had a small liability potential and rejected a large settlement offer, the fee should be reduced under the same facts. However, if a multiplier is considered first, such a case would fall into the category of "unlikely to succeed at the outset" and a multiplier of 2.0 to 2.5 would be applied. Thereafter, even with a downward adjustment based on the "then apparent lack of merit in the claim," it is likely the award would be in excess of the lodestar, as it was in this case. Such a result does not comport with Dvorak or the statute.

As such, it was error as a matter of law for the court to conduct its analysis in this manner. If a multiplier is to be considered, it must be weighed **along with** all other factors to determine a reasonable fee.

C. The Trial Court Abused its Discretion in Failing to Award a Reduced Fee Under the Totality of the Circumstances of This Case.

Setting aside the legal errors in the court's ruling, the

court abused its discretion in failing to reduce Plaintiffs' fee award pursuant to the statutory criteria and principles enunciated by this Court. The record as a whole demonstrates that the overarching notion of reasonableness was completely ignored, thereby necessitating reconsideration of the fee awarded.

As described earlier, Dvorak provides the analytical framework by which to determine attorneys' fees pursuant to section 768.79. Because the statute does not permit issues of reasonableness to be injected into the determination of entitlement, the rationality of defendant's decision not to settle must be taken into account in determining the amount of an award. Thus, as the court explained:

> [I]n a given case, the court could justifiably reduce the amount of the attorneys' fee to be assessed against a severely injured plaintiff who suffered an adverse verdict after rejecting a small settlement offer. By the same token, the court could reasonably conclude that a defendant with a small liability potential who rejected a large settlement offer should pay only a reduced fee even though the verdict ultimately exceeded the offer by more than twenty-five percent.

Id. at 613. The undisputed evidence demonstrates that this case falls squarely within the framework set forth in Dvorak for a reduced fee. Plaintiffs' own expert, Swope, said it best:

> This is a case which was probably at the outset of this case and the time the offer of judgment was made, if I could of picked sides, I probably would of picked the defendant's side in this case if I was going to be a betting man. I probably would of picked sides with the defendant. It was not likely to have been won. It had a big issue on whether the plaintiff could get past the first question. It had a big issue on comparative negligence. It had a huge issue on Fabre offset particularly with respect to the father's claim, so I felt there was probably, to use

> the language of the case, the success was unlikely at the time the offer of judgment was made.

(S.T. 120)

Swope also noted that "there was a very significant risk that the case was going to be lost." (S.T. 117) Later, he stated:

> I think at the time the offer of judgment was made, people probably reasonably foresaw this as going to court on a design and manufacturing theory — it would have been a tough case.

(S.T. 141) Finally, Swope testified that it was not until the deposition of Pirelli's expert, (which was after the demand expired), that Plaintiffs had a case. In his terms, "it gave the plaintiff then a gift of a case." (S.T. 131)

Along the same lines, the trial of the case, including this Court's rulings throughout and the ultimate outcome, clearly established that Plaintiffs' claims involved very close questions of both law and fact. The court entered a directed verdict in Pirelli's favor on the manufacturing defect claim. The jury rejected Plaintiffs' claim that there was a design defect. The court granted Pirelli's directed verdict motion insofar as it related to a claim of inadequate warnings. It was only during the final hearing on Pirelli's directed verdict motion, held just prior to the jury charge conference, that Plaintiffs argued for the first time that the claim at issue involved "no warnings" rather than "inadequate warnings." Ultimately, Plaintiffs prevailed on this limited issue.

On these facts, the parties' experts concurred that there was a closeness of law and facts and that this would serve to decrease

any award. As such, analysis of this factor serves to substantially decrease the attorneys' fee award.[9]

Based on the foregoing, the record proves conclusively that the fee award should have been decreased. Indeed, the trial court agreed that the fee should be reduced. The problem however, was that as a result of the court's use of a multiplier, the net effect of the court's decision was an enhanced, rather than reduced fee.

In light of the undisputed evidence, it is clear that the court abused its discretion in awarding fees in excess of the lodestar. Since all of the relevant factors undeniably served to decrease the award, the judgment should be reversed with directions to award reduced fees in accordance with the undisputed evidence.

[9] Defendant's expert also opined that the nature and number of offers as well as Plaintiff's failure to timely provide the identity of its warnings expert were depressing factors as well.

CONCLUSION

Based on the foregoing, Pirelli requests that the final judgment be reversed with directions to award fees in accordance with the statutory factors set forth in section 768.79.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail on June ___, 2000, to **HUGH N. SMITH, ESQUIRE,** *Attorney for Plaintiffs*, Smith & Fuller, P.A., Barnett Plaza, 101 East Kennedy Boulevard, Suite 1800, PO Box 3288, Tampa, Florida 33061.

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